In the

Supreme Court of the United States

October Term, 1948

No. 109

FEDERAL POWER COMMISSION, *et al.*

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 168

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 200

MEMPHIS LIGHT, GAS AND WATER DIVISION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 112

ILLINOIS COMMERCE COMMISSION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

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BRIEF FOR MISSISSIPPI RIVER FUEL CORPORATION, A RESPONDENT.

Opinion Below.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.

Jurisdiction.

The order of the Court of Appeals was entered May 12, 1948 (R. 109-112). Petitions for writs of certiorari in Nos. 109, 188, 209, and 212 were timely filed and the writs of certiorari were granted on October 11, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

Statement.

The historical statement of the events leading up to the judgment here under review, as contained in the brief for the Federal Power Commission (Commission) on pages 3 to 8 is correct in the main. In addition it is important to note that the schedules embodying the reduced rates ordered by the Commission, while not filed by Interstate Natural Gas Company, Incorporated (Interstate) until December 10, 1947 actually were made effective for all bills rendered to Mississippi on and after July 15, 1943. The filed schedules thus complied with the Commission's order requiring the filing of the reduced rates by June 15, 1943.[1] Such rates thereby became the only lawful rates applicable

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[1] Paragraph "(c)" of the Commission's order of March 17, 1948 (not yet reported) accepting Interstate's rates filed December 10, 1947, states:

> "Interstate filed on December 10, 1947, supplements to its schedules of rates and charges to effect the remaining amount of the reduction ordered by the Commission's order of April 27, 1943, as modified. Such new supplements are designated as Interstate's Supplement No. 8 to Rate Schedule FPC No. 4, covering the sale of gas to Mississippi River Fuel Corporation; Supplement No. 1 to Rate Schedule FPC No. 26, covering the sale of gas to Southern Natural Gas Company; and Supplement No. 3 to Rate Schedule FPC No. 25, covering the sale of gas to Memphis Natural Gas Company. Such supplements are proposed to be made effective as to all bills rendered on and after June 15, 1943, for sales to said purchasers."

to the sale of natural gas by Interstate to Mississippi subsequent to June 15, 1943 and were the basis for computing the amount of excess charges collected from Mississippi by Interstate during the effectiveness of the stay order entered June 14, 1943 (R. 72). Collection of the reduced rate commenced in October 1947 (R. 72), but it is not correct that they were only put into effect as stated in the Commission's brief, page 4.[2] The total amount of excess charges paid by Mississippi during the effectiveness of the stay order is $1,484,582.53 (R. 110). The statement of allocation of impounded funds furnished by the Commission (R. 30) shows that 63% of the excess charges relate to gas sold by Mississippi to direct industrial consumers. Of the 37% allocable to gas sold to utility distributing companies for resale, those companies have already directly received from Mississippi, the allocated excess charges paid subsequent to January 20, 1946 (Commission brief, pp. 55-57, note 25). This leaves for consideration by this Honorable Court in the case of Mississippi the disposition of the excess charges paid prior to January 20, 1946 allocable to gas sold to the utility distributing companies.[3] Not only does Mississippi have a clear and recognizable legal right to be repaid the entire excess collected by Interstate but Mississippi stands in a unique and strong equitable position as to all of such excess charges.

[2] The significance of the actual effective date being June 15, 1943 rather than October 1947 is found in the right of Mississippi under the Natural Gas Act to recover from Interstate charges for natural gas in excess of those specified in the lawfully effective schedules now on file with the Commission. The Natural Gas Act and the Commission's rules prohibit the collection of any other than the lawfully filed rate.

[3] We do not find any contention in the Commission brief that the excess charges allocable to direct industrial sales should be distributed to those customers. (Commission brief, p. 51, note 22. See discussion *infra*, p. 21.)

The Commission rate proceedings against Mississippi instituted in 1943 resulted in a rate order on November 9, 1945, made effective January 20, 1946 (4 F. P. C. 340) which was remanded to the Commission by the Court of Appeals of the District of Columbia (*Mississippi River Fuel Corporation* v. *Federal Power Commission et al.*, 163 F. 2d 433) and finally was settled by stipulation on May 8, 1948 (Commission brief, p. 56). By this stipulation Mississippi among other things, in the words of the Commission brief herein (*supra*) was "to pass on that portion of the reduction in cost stemming from the Interstate rate order which accrued since January 20, 1946, the date on which the Commission had originally ordered Mississippi to place reduced rates in effect." This has been done pursuant to that stipulation and the Commission issued an order on the basis thereof. (This order is set forth as a part of the stipulations appearing as Appendices A and B of Mississippi's brief in opposition to granting certiorari, pp. i *et seq.*, particularly viii and xx).

The claim which Mississippi asserts to the fund, therefore, must be considered in the light of the following facts: It already has passed on to its distributing company customers any benefits from the Interstate rate order by reduced rates for that part of the impoundment period commencing with January 21, 1946, the earliest day the rate order could possibly have taken effect against Mississippi. The utilities in Missouri and Illinois have agreed to pass on the benefits of any reduction in the rates of Mississippi (R. 94, Commission brief, p. 49, note 21). It is apparent that the only question as to Mississippi is whether it loses that portion of the impounded funds represented by excessive charges paid by it before January 21, 1946, the effective date of the Commission rate order (See Commission brief, p. 56, note 25).

As indicated in the Commission brief (pp. 55 *et seq.*) the Commission based its rate order against this respondent on 1943 sales. In so doing, however, it expressly did not use actual 1943 costs as a basis for determining excesses over fair return.[1] No findings whatsoever were made as to the years 1944 and 1945.

The Questions Presented.

Before stating the questions to be considered by this Honorable Court in reviewing the judgment as it relates to Mississippi we are compelled to take issue with the Commission's brief as to the matters presented for this Court's determination. Twice at the outset the Commission's brief states that the Circuit Court considered and held itself "*compelled*" by *Central States Co.* v. *City of Muscatine*, 324 U. S. 138 to distribute the collected excess charges to those who paid them (Commission brief pp. 2 and 8). No such statement is found in the Circuit Court's opinion (R. 103-105). It is a self-serving conclusion inserted as a stepping stone to the principal object of all the petitioners—namely, the overruling of the *Central States* case.

The points here for decision are *not* the overruling of the *Central States* case or whether that case compels distribution of the excess charges to those who paid them to Interstate. The citation of that case in a footnote without any quotation therefrom or comment thereon is not indicative of the total basis for the judgment below.

[1] The Commission adjusted actual expenses downward and used speculative future expectations in business as the reason for not using expenses as actually incurred. The full text of the Commission's order and opinion indicates that 1943 was used as a test year for sales volumes and gross revenues alone and the Commission did not make any conclusions as to the *actual* 1943 rate situation. See 4 F. P. C. 340, 346-351, 360.

The opinion of the court below (R. 103-105, 166 F. 2d. 796) discloses that the court after "A careful consideration of the opposing contentions, in the light of the undisputed facts" felt that it only could award to the pipe line companies the amounts which *they* paid and that if others have rights in any part of the fund, it was not that court's duty "to search out or declare them". The issues and the facts moved the court below, not any feeling of compulsion from *Central States*.

Particularly as relates to Mississippi the questions to be passed upon are these:

1. Does the Natural Gas Act prevent one natural-gas company from recovering charges of another natural-gas company found to be unlawful and excessive by the Commission and ultimately sustained judicially, because such excess charges were ordered impounded as a condition to a stay?

2. What is the authority of a Court of Appeals in respect of a request for a stay of an order which is being reviewed under Section 19 of the Natural Gas Act?

3. Did the Court of Appeals abuse its discretion, inherent in the exercise of its equitable jurisdiction, in entering the order of distribution to the natural-gas companies who paid the unlawful charges?

4. If a natural-gas company was compelled to pay excess charges during and because of a stay but later effectuated a plan with the Commission to give up that portion of excess charges paid from the earliest possible time a rate order could have been effective against it, can it now be required to give up the remainder which would be more than would have been legally requirable had no such stay ever been entered?

SUMMARY OF ARGUMENT.

I.

The Judgment of Distribution to Mississippi is proper under the Natural Gas Act.

1. While the principles inherent in the *Central States* case are not in conflict with the judgment under review, nevertheless Mississippi does not rely on that case as a justification for its claim to recover the charges unlawfully collected from it.[5]

Were it not for the Natural Gas Act this case would not be here for review. Consequently the directions of that Act should be followed in deciding this case.

The Natural Gas Act provides for full rate regulation of a natural-gas company by the Commission which it exercises by the medium both of interim and final orders. *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U. S. 575. The Commission exercised this authority against Mississippi to the fullest extent permitted by the Act and thus provided for passing on of the Interstate reduction from the date of the Commission's order reducing rates of Mississippi. The result is the same as if the Interstate rate order had not been stayed and the Natural Gas Act does not provide for more than that.

2. By Section 19 of the Act the Court of Appeals has exclusive jurisdiction to affirm, modify or set aside a Commission order, subject to review by the Supreme Court of the United States upon certiorari or certification. The Act provides that the commencement of review proceedings

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[5] Since the Commission's brief directs its argument to the excess charges allocated to sales to distributing companies for resale, we do likewise at this point. We discuss Mississippi's right to the excess charges allocated to its direct industrial sales *infra*, p. 21.

"shall not, unless specifically ordered by the court, operate as a stay of the Commission's order" Section 19(d). The Act makes no provision for terms and conditions so that the granting of a stay is wholly within the court's discretion. It is acting as a court of equity and accordingly has broad discretionary powers.

3. At the time of the entry of the distribution order the Commission had pending a rate case involving rates of Mississippi and so the court properly ordered the payment to Mississippi of the entire impounded funds since whatever could be done by the Commission under the Natural Gas Act remained to be done. Thus, the purpose and plan of the Natural Gas Act was carried out both by the court's judgment and the subsequent settlement of the Mississippi rate case. There was no abuse of the discretion lodged in the court by the Act.

II.

The Contentions of the Commission Are Not Inconsistent With a Distribution to Mississippi.

1. Assuming all of the alleged infirmities and distinguishing features of the *Central States* case which the Commission urges as grounds for overruling or distinguishing that case, the contentions of Mississippi are substantially consistent with all that the Commission argues. Since the Commission has no reparation powers and Mississippi has given effect to the final rate reduction order against Interstate back to the time any rate determination could possibly have been effective against Mississippi, its (Mississippi's) "ultimate consumers" have suffered nothing from the grant of the stay in the Interstate review proceedings.

2. Since the Commission argument assumes that there occurred "a loss as a result of the court's action in granting

the stay", the consistency between the Commission's argument and the contentions of Mississippi is apparent because no mediate consumers of Mississippi will suffer loss from the granting of the stay. Also Mississippi from January 21, 1946 until the time funds were no longer impounded under the Interstate stay, has earned a return fixed by the Commission itself and thus the rate situation of Mississippi's mediate customers was not changed one iota by the fact that a stay was granted in the *Interstate* case.

3. Since Mississippi's mediate customers have not suffered by the fact that there was judicial review, the doctrine of the *Central States* case in Mississippi's situation has no applicability and since Mississippi itself never sought a stay of the Commission rate order against it, there can be no implications of frivolity in seeking a stay pending appeal so far as Mississippi is concerned. As to whether a stay order as an abstract matter encourages frivolous litigation, complete answer is found in the fact that the stay does not issue as a matter of right and its granting and continuance is subject to the grace of the court and the searching inquiry of the Commission.

4. Whether the *Central States* case is overruled or distinguished should make no difference in the award of the proper share of the fund to Mississippi since the "ultimate consumers" of Mississippi will be made whole to the same extent as though a stay order had never been entered in the *Interstate* case. Since the alleged frailties of the *Central States* case lie in the fact that a stay order operates to deprive a certain company's "ultimate consumers" of their share of a reduced rate, the argument is inapplicable against Mississippi since Mississippi's "ultimate consumers" are not adversely affected by such stay order.

ARGUMENT.

I.

The judgment of distribution to Mississippi is proper under the Natural Gas Act.

(i) The Natural Gas Act does not require Mississippi to distribute to ultimate consumers excessive charges collected from it.

The Commission, by Section 5 of the Natural Gas Act, after a hearing, has authority to determine if the rates charged by a natural-gas company are unlawful, and then must fix the lawful rate. Until changed by the filing of new schedules by a natural-gas company or by a Commission order the rates contained in the duly filed schedules are the only rates which can be collected or paid.

> "No natural gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the Commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the Commission, unless the Commission shall, for good cause shown, otherwise provide by order." (General Rules and Regulations of Federal Power Commission (Effective Jan. 1, 1948) Part 154.2, 12 Fed. Register 8598.)

The right to recover excess charges is based upon this rule and Sections 4 and 5 of the Act.

The powers of the Commission in rate matters are plenary and, while there is no right to order reparations (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320

U. S. 591, 618) there is authority to give present effect to an imminent reduction in operating expenses. The Commission, after hearing, has utilized the technique of an interim order so that a prompt reduction may be had. Such was done in reducing rates of Natural Gas Pipeline Company of America, and the interim power was sustained (*Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575). The Commission used this interim authority in rate cases against Cities Service Gas Company, 3 F. P. C. 459, and Panhandle Eastern Pipe Line Company, 3 F. P. C. 273.

The settlement method of reducing rates also has been used as is well illustrated by examples in the Commission brief, page 36, as to United Gas Pipe Line Company, pages 53-55 as to Southern Natural Gas Company, and pages 57-58 as to Memphis Natural Gas Company. In each of these instances the Commission had plenary authority to make an interim order and as a condition to the acceptance of any settlement could have required an adjustment in respect of the Interstate reduction; as it did in the case of United Gas Pipe Line Co.

That the Natural Gas Act contemplates complete rate jurisdiction in the Commission, and not in the Court of Appeals as a condition to a stay is well illustrated by the actual sequence of events in the case of Mississippi.

The Commission instituted a rate investigation against Mississippi on April 6, 1943, prior to the order reducing Interstate's rates. 3 F. P. C. 972. Until a hearing was had no valid order against Mississippi could have been entered and it was on November 9, 1945 that a reduction in Mississippi's rates was ordered. Since the Interstate rate order had been stayed no effect to it was then given. Mississippi filed a review petition and the order reducing rates was

affirmed in part and reversed in part. This put the matter back before the Commission and then the final order closing the case gave full and complete effect to the Interstate reduction. (Commission brief page 56; Commission order of July 20, 1948, Appendix A to brief of Mississippi in opposition to Certiorari vii to x).

The fact that the Commission did not exercise all its authority against Southern Natural or Memphis Natural is not a justification to the exercise of those rate fixing functions by the Courts. Particularly, is this clear in the case of Mississippi. Beginning in June 1943, it was compelled by the operation of the stay order to continue paying to Interstate the same amounts for gas that it had paid previous to the Power Commission rate order against Interstate. It was not until January 20, 1946 that any determination had been made effective in respect of the reasonableness of Mississippi's resale rates. On such date Mississippi effected the lower rates, subject to court review. Since that time such review has been had and by rates now on file with the Commission, the reduction in price of Interstate gas to Mississippi has been passed on in accordance with the Power Commission's order accepting such rates for filing back to January 20, 1946. Had no stay been granted in the *Interstate* case, Mississippi would have been entitled to keep all of the money represented by the difference between the old Interstate rate and the Power Commission prescribed Interstate rate. It would have been perfectly legal and proper for it to have done so. How then can it be said that it would not now be legal, proper and equitable for Mississippi to have turned over to it its aliquot portion of the fund? The answer is that in justice and equity Mississippi is entitled to its share in the fund. (See *Atlantic Coast Line Railroad Company* v. *Florida*, 295 U. S. 301, 309-311).

Since the Natural Gas Act does not require any reduction in Mississippi's rates prior to January 21, 1946, no distribution to any other than Mississippi of its share can validly be made. Its rates thus would be reduced without a valid order and the court would be doing that which is prohibited to the Commission. The Natural Gas Act does not provide for more than would result had there been no stay.

(ii) The Court of Appeals has broad discretion in the granting of a stay and the conditions thereof.

The only authority which the Natural Gas Act confers upon the Court of Appeals is found in Section 19 (b) and (c) which confers exclusive jurisdiction to affirm, modify or set aside a Commission Order, subject to review by the Supreme Court of the United States upon certiorari or certification.

By Section 19(c) of the Natural Gas Act (15 U. S. C. Sec. 717(c)) it is provided that:

> "The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

This in effect means that it is within the court's discretion whether a stay will or will not be granted (*Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 9-11), and it also is within its discretion whether it will impose any condition—such as impoundment. (*Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, 271). The reviewing court, therefore, is exercising equitable powers to which a great measure of discretion attaches. *Inland Steel Company* v. *United States, et al.*, 306 U. S. 153; *Ford Motor Co.*

v. *N. L. R. B.*, 305 U. S. 364; see also dissent by Mr. Justice Douglas in *Central States Electric Company* v. *City of Muscatine*, 324 U. S. 138, 152.

The inquiry, therefore, must be to whether this discretion has been abused.

Conflicting claims arising out of rate determinations are similar to causes of action for restitution—a remedy equitable in origin and function. Cf. *Atlantic Coast Line Railroad Co.* v. *Florida, et al.*, 295 U. S. 301, 309. In that case it was stated: "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it * * *" (*id* at 310).

The case which best illustrates the breadth of discretion involved is *Inland Steel Company* v. *United States, et al.*, (306 U. S. 153). In that case this Court spoke of the discretion lodged in a court of equity in a case such as this in terms which indicate clearly that not only is the discretion as to the granting of a stay order with or without conditions very broad but also in such a way that, along with the authority of *Ford Motor Company* v. *N. L. R. B.* (305 U. S. 364), there is ample authority for the statement by Mr. Justice Douglas in his dissent in *Central States Electric Company* v. *City of Muscatine (supra)*, that "* * * the federal court which has this fund has considerable discretion in its management. *United States* v. *Morgan, supra.* I fail to see how it abused its discretion in handing the fund over to the officials."

(iii) There was no abuse of discretion.

Given the large measure of discretion lodged in the court below, it is proper to analyze briefly just how the

court exercised its discretion both in respect of applicable facts and applicable law.

(a) The Fund and Its Origin.

Beginning not later than July 30, 1943, Interstate deposited in the registry of the court below the monthly difference between payments under the old rates and those rates required by Power Commission order. These deposits continued through October, 1947. On bills rendered for gas purchased after October 1, 1947, Interstate gave effect to the Power Commission rate order, and new rate schedules were filed effective July 15, 1943 (see footnote 1, *supra*). On final reckoning, it was determined that more money than had been impounded had been paid by the three purchasing pipe line companies, and Interstate admits this additional liability (R. 16-19). All these funds, "of which $1,484,582.53 is applicable to excess charges to Mississippi River Fuel Corporation" (R. 110) represent the difference between the attacked and the prescribed rates.

There is no dispute that Mississippi was an immediate obligor of Interstate and directly paid to Interstate the funds now in dispute (R. 57). It is apparent, also, that the rate situation of Mississippi in respect of its resale sales was never determined finally during the period of impoundment, and as indicated elsewhere herein (*infra* p. 29) no finally effective rate order was entered against it on its sales for resale until July 20, 1948.

(b) Any Other Result Would Require the Court to Engage in Rate Making.

It is well recognized that it is not part of the judicial process to engage in the function of making rates. *Central States Electric Company* v. *City of Muscatine*, 324 U. S. 138,

143; *Central Kentucky Natural Gas Company* v. *Railway Commission*, 290 U. S. 264; *Newton* v. *Consolidated Gas Company*, 258 U. S. 165, 177. Yet, if the court below had done what the petitioners contend should have been done, judicial rate making would have been the inevitable consequence. The Commission seeks to get around this point by noting that rate making is a legislative process prospective in scope and that questions of past fairness are judically determinable questions. This as a matter of strict division of functions may or may not be correct. See *Arizona Grocery Company* v. *Atchison, T. and S. Fwy.*, 284 U. S. 370. The best discussion of the reason for the bifurcation is contained in the *Attorney General's Manual On the Administrative Procedure Act* (1947). (See 5 U. S. C. Sec. 1001 *et seq.*):

> "More broadly, the entire Act is based upon a dichotomy between rule making and adjudication. Examination of the legislative history of the definitions and of the differences in the required procedures for rule making and for adjudication discloses highly practical concepts of rule making and adjudication. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941) pp. 657, 1298, 1451. Conversely, adjudi-

> cation is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted. Sen. Rep. p. 39 (Sen. Doc. p. 225); 92 Cong. Rec. 5648 (Sen. Doc. p. 353)."

It is apparent from this considered discussion that formulation of policy is as important a consideration as is the element of time in determining whether a matter is legislative or not. In the case at bar, the court below would definitely have to engage in policy making and rate making in order to reach any result other than the one here on review. Whether the function would be legislative also would only add another infirmity to the court's assumption.

Mississippi makes sales for resale as well as direct sales for consumption (R. 55-56). The former are regulable by the Power Commission, the latter by state authorities if appropriate state legislation to that end exists. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U. S. 507. With this situation, what could the court below do? If all of the claimed funds were handed out to so-called ultimate consumers, the court, contrary to the assertions of petitioners, would be indulging in local law and would impinge upon local regulation. This is indisputable since some of the funds result from sales that are only regulable by states—in the case of Mississippi, this is the greater amount of sales (*supra* p. 3). Therefore, the court below would have had to make an allocation of the

fund. But how? On what basis can it do so without engaging in a rate making function? It must be emphasized that each pipe line company paid Interstate the total purchase price for *all* gas regardless of who ultimately would use it. Therefore, the fund represents amounts paid for federally-regulable as well as state-regulable gas sales. Thus, to give to each consumer his just due, assuming his right thereto, would inevitably require an allocation not only of the jurisdictional factors but also an allocation of that part of the fund paid by Mississippi. It would entail an entry into a myriad of questions of fact and none of law. Cf. *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581, 590. To make such an allocation would require the determination, *inter alia*, of a return to which Mississippi was entitled from its direct state-regulable sales and thus a determination of the proper state rate for each state. This may not only be required for the whole impoundment period but requirements of justice and equity might require it for each of the forty months in which payments were made into the registry of the court. Considering these factors, there is no way of telling how much any consumer is entitled to without valid and complete rate determinations and, consequently, many determinations of local policy. Also, it would be necessary to determine the extent of every state's exercise of its authority not only to regulate the direct sales within its jurisdiction but also to award reparations therefor[6]. Conceivably, if the court below had awarded the fund to all consumers, Mississippi might find itself muleted further and for the same sales by a subsequent award of reparations based on different concepts by a competent state agency.

[6] By order dated December 22, 1948, the Missouri Public Service Commission held that Mississippi's direct industrial sales are not subject to regulation by that body under the statutes of the State of Missouri.

Bearing in mind that a federal court should not engage in rate making and, in state-regulable matters because it is a function reserved to the states (*Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264, 271), it would be hopelessly impracticable and unfair, as well as an usurpation of state functions for a court as an incident of review to enter the uncertain field of rate determination. See *Atlantic Coast Line Railroad Co. v. Florida*, 295 U. S. 315, where Mr. Justice Cardozo, in respect of restitution awards after a rate determination in a much simpler situation, stated at p. 318:

> "The present record does not satisfy us that a new scale should be set up to govern claims for restitution. The field of inquiry is one in which the search for certainty is futile. Opinions will differ as to the qualifications of experts, the completeness of their inquiry into operating costs, the accuracy of their methods of computation, the soundness of their estimates. There is a zone of reasonableness within which judgment is at large."

(c) Conclusion as to the Exercise of Discretion.

It seems clear that the court below had only the course which it adopted in the management of the fund. Faced with the facts that Mississippi paid the money to Interstate; that only it and the other similarly situated companies were in privity with Interstate; that Interstate would not secure any benefits from the impoundment; that the greater part of the sales by Mississippi were subject only to state regulation if at all; that it could pass on any interest in the fund beyond Mississippi only by indulging in the activity of federal and state rate and policy making; and that

Mississippi's rates were still under consideration by the Commission, it seems clear that the court exercised not only sound discretion but acted in the only manner consistent with the applicable law and the realities of the situation.

(d) Direct Sales to Industries.

Reference has been made to the power of the states to regulate these sales if appropriate state legislation was enacted. These sales are made under contracts privately negotiated for specific periods of time. They are not made as public utility sales (R. 74-75). The Public Service Commission of Missouri has recently held that the statutes of that state do not provide for regulation of these sales as made by Mississippi. A proceeding in Illinois to test the regulatory authority of the Illinois Commerce Commission over Mississippi's sales to industries in that state is still pending (R. 75). The amount of excess charges allocated to those industrial sales is the greater part of the unlawful exactions. These sales are purely private transactions carried on as a private business in competition with other fuels. The competitive value to the industry determines the price. The cost of gas to Mississippi is not what sets the value to the industrial purchaser. To distribute to these industrial customers the excess charges paid by Mississippi would constitute the plainest example of taking from A and giving to B.

While little is said in the Commission brief about these sales, we do not find any contention that Mississippi is not entitled to that part of the impounded funds. The court could have done none other than distribute that part to Mississippi.

II.

The contentions of the Commission are not inconsistent with a distribution to Mississippi.

Reduced to essentials, petitioners all contend that the order of the Court below should be reversed because the stay order deprived ultimate consumers "of the benefits of the reduced costs of gas purchased through three intermediary pipeline companies." All contentions in respect of *Central States Electric Company* v. *City of Muscatine* (324 U. S. 138) and subsidiary points in urging overruling or distinguishing of that case are calculated to remove the doctrine of that case from this situation. Mississippi, being in the position that it is, can demonstrate herein that all the Commission's brief in the main states, except for the erroneous conclusion as to the effect of the rate determination based on 1943 sales volumes (see Statement) is consistent with the return to it of the excessive charges paid by Mississippi.

Mississippi respectfully requests constant attention to the fact that it has, with Commission approval and agreement, given effect to the Interstate rate order back to the time the Commission ordered Mississippi to reduce its rates, in January 1946. This had the same effect as though no stay order ever had been entered in the Interstate rate case since only a prospective rate order can be made by the Commission. See *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 581, 618. It is evident therefore that if Mississippi must give up its share of the excessive rates paid before the Commission rate order against it was effective, it loses more than it would have lost had a stay never been granted. Assuming, *arguendo*, the

accuracy of what the Commission contends, Mississippi still is entitled to its share of the total fund.

The first main heading (I, p. 17) of the Commission's argument is "THE *Central States* CASE SHOULD BE REEXAMINED AND OVERRULED."

A. The Commission contends: "*A federal court has jurisdiction to distribute impounded funds to ultimate consumers, as against the claim of purchasers for resale.*"

The *Central States* case like the one at bar arose entirely out of the fact that a stay had been granted. The Commission argues then that the court below acting as a court of equity granted injunctive relief which must be predicated upon terms protecting those whom the injunction might affect (citing *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157). Pervading such function the court, so argues the Commission, can arrogate unto itself extraordinary and even extra judicial powers because the stay was ancillary to the main purpose of review and can protect all concerned even though not parties to the record. Equity is charged, therefore, with "ascertaining who suffered a loss as a result of the court's action in granting the stay" (Commission brief, p. 22).

Up to this point, there is nothing inconsistent with Mississippi's claim. A departure occurs (pp. 22-23), however, when the Commission contends all three pipe line companies including Mississippi suffer no loss from the stay. There is loss of the difference between the greater costs as paid and the Commission rate. This was money Mississippi could keep at least until a rate order became effective against it had no stay been granted. Mississippi at the date of the stay order, already was before the Com-

mission in a rate investigation (Commission brief, pp. 55-56). Here there would be monetary loss to Mississippi since it would have to pay out what it otherwise could have kept had there been no stay order at all. The Commission must agree with this construction since it concludes this portion of its argument as follows: "It is only those consequences which resulted from the stay which the court should correct in distributing the impounded fund." (p. 23) This quotation is the gravamen of the Commission's argument and is wholly consistent with the action of the court below in ordering distribution to Mississippi.

Next the argument is taken up with an attempted demonstration that only the ultimate consumers suffer monetary loss by the stay; that in equity they are entitled to the fund; and, again, that the court below should attempt, and it is within its competence, to correct the wrong resulting from the stay. This assertion that only ultimate consumers suffer loss clearly is not so as to Mississippi since under the aegis of the Commission itself this respondent has given effect to its rate situation in a manner calculated, as the Commission admits (pp. 49, 50, 56), to give downstream customers, through state commissions having jurisdiction over the distributing companies, the same benefits that would have accrued had no stay been granted.

The last contention made under Part I, Subsection A of the Commission brief (pp. 31 *et seq.*) is that excessive return for the impoundment period would be given to the immediate purchasers from Interstate and that to prevent this, administrative determinations may be used. If already has been demonstrated that for the period of time in which the Commission was competent to act, this respondent has earned a return fixed by the Commission itself. As to what went before, the rate situation of Mississippi's customers

would not have been one iota different if a stay *never* had been granted to Interstate. With this established fact, Mississippi's mediate and immediate purchasers are securing all their just and legal due under the Natural Gas Act and that is all the Commission is claiming for them.

B. The Commission Contends: *"The Doctrine of the Central States Case Defeats the Objectives of the Natural Gas Act for the Period of Judicial Review."*

Under this subhead, the Commission argues that the doctrine of the *Central States* case nullifies the protection to ultimate consumers contemplated by the Natural Gas Act. Without admitting the validity of this argument, the fact remains that the doctrine of the *Central States* case has not affected Mississippi's "ultimate consumers" in any respect whatsoever. These consumers of Mississippi whether remediless as contended by the Commission (p. 40) or not, have been the recipients under a plan having Commission approval of all benefits which would have accrued had no stay order *ever* been entered in the Interstate case.

Next (p. 41) the Commission contends that the doctrine of the *Central States* case encourages frivolous litigation. In purported proof of this, the Commission points out that there was at the time the record was made in the Interstate case a stock and officer affiliation between Interstate and Mississippi. Entire refutation of the point sought to be made, however, is contained in the fact that Mississippi, before complete disaffiliation took place, appealed the Commission rate order against it *without asking for a stay and began the process of filing rates as contemplated by the Commission order* (R. 93, 96). As to Mississippi therefore no encouragement of frivolity is even remotely involved.

Also, in respect of this portion of the Commission's argument, even though it is evident that Mississippi is not affected by it, insight of the real motive behind this review can be gleaned from the apparent fact that the Commission is primarily concerned with establishing a principle contrary to the clear and express intention of Congress in providing for stay machinery in the Natural Gas Act (Section 19(c), 15 U. S. C. Sec. 717r(c)) and also is attempting now to attack the grant of the stay order; and also is arguing a matter outside the warrant of the writ of certiorari granted herein. In the first place, no frivolity was involved, nor was the stay order improvidently granted, for it must now be assumed that the importance of the jurisdictional question on the review proceedings, the justness of the request for a stay, and the balancing of conveniences and equities impelled the court below to grant a stay in the first instance. These are proper considerations when a stay is requested. *Magnum Import Company* v. *De Spoturno Coty*, 262 U. S. 159, 163-164. If the Commission at the time the stay was granted (or at any time thereafter if circumstances changed, see Stay Order, R. 2) was dissatisfied therewith (which was improbable since Commission counsel approved the form (R. 3)) it could have appealed the granting thereof to this Court. *Beaumont, Sour Lake & Western Railway* v. *United States*, 282 U. S. 74, 92; *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U. S. 381, 404. Since no appeal was taken nor cross appeal or petition filed at the time the rate determination was before this Court (331 U. S. 682), it hardly seems proper to give the Commission a second and third hearing on that matter—such is not the disposition nor function of the United States Supreme Court. See *Magnum Import Company* v. *De Spoturno Coty*, 262 U. S. 159, 163-164. A stay is a traditional judicial

method of minimizing the effects of far reaching judgments and orders and has been granted without express organic authorization. "The propriety of its issue is dependent upon the circumstances of the particular case." *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 9-14. Reliance surely can be placed upon the courts of appeal and upon the Commission's opposition to a stay if any review proceeding appears frivolous. The granting of a stay is wholly discretionary.

C. The Commission contends: *"This Court should overrule the Central States case."*

Mississippi, it is submitted, would not be adversely affected by an overruling of the *Central States* case if the Commission thesis still prevails that the "ultimate consumers" should get all they would have been entitled to had no stay ever been granted.

It should be sufficient to point out that Mississippi's "ultimate consumers" will be or have been made whole to the same extent as though no stay order ever had been entered in the *Interstate* case.[7] In accepting such a condition of ending its rate case, Mississippi did rely upon the court's order of distribution and gave up the equivalent of the funds expected to be received. An order of complete

[7] The stipulation between Commission's General Counsel and Counsel for Mississippi ending the rate proceedings, which was accepted by the Commission, after setting forth the rates to be charged, provided:

> "The rates and charges specified for the period from January 21, 1946 through and including the month of September 1947 reflect and give effect to the reduction in rates of Interstate Natural Gas Company, Incorporated, for that period. While usually treated as a commodity cost, the reduction in this instance is given effect by reflecting it in the demand charge as above set forth."

distribution to others would result in financial loss to Mississippi. To go beyond the agreement settling Mississippi's rate proceedings would be tantamount to requiring the court below to award reparations contrary to the intent of Congress (*Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 618) and contrary to the contentions of the Commission that "Court and agency are the means adopted to attain the prescribed end." (Brief, p. 34 quoting *United States* v. *Morgan*, 307 U. S. 183 at 191). Under the Natural Gas Act, the prescribed end is the prescription of rates for the future only (*Hope* case, *supra*).

The second main heading (II, p. 48) of the Commission's Argument is "THE PRESENT CASE IS DISTINGUISHABLE FROM THE CENTRAL STATES CASE."

Both in this main part of the Commission's argument and the foregoing main part, the Commission assumes that the court below felt compelled to find as it did because the *Central States* case compelled it to do so. We have heretofore pointed out the fallacy of this reasoning.

A. The Commission contends: "*The claims of the immediate purchasers here do not raise any questions determinable only by a state agency.*"

At this point, Mississippi is interested in merely pointing out that if only federal law is applicable to the situation, that federal law or doctrine must be consistent with the federal function under the Natural Gas Act and in conformity therewith, Mississippi is entitled to its share of the fund without any claim of or in the nature of reparation. (See *Federal Power Commission* v. *Hope Natural Gas Company*, *supra*). Having given effect to its rate situation from the date of the earliest *possible* effective Commission action

against it, Mississippi is not affected by this portion of the Commission's argument.

B. The Commission contends: "*The claims of the immediate purchasers do not involve rate making*".

In the general discussion of this point in its argument, the Commission asserts that the ground urged by the pipeline claimants to the fund in the court below was one of privity. Examination of what was urged by Mississippi, however, will indicate that this respondent disclosed to the court its then rate case posture which was one of complete indefiniteness because of the partial reversal on appeal (R. 73-74). It also is disclosed therein that the Court of Appeals in remanding Mississippi's rate order to the Commission indicated the effect of the Interstate reduction should be considered and effectuated. This the Commission certainly did by the terms of the stipulation and final rate order in Mississippi's case above referred to. The fact is that when the petition for intervention and for distribution of funds was filed in the court below, Mississippi had no effective definitive rate order against it because of the partial reversal and remand on its appeal (163 F. 2d 433).

All that the Commission found with respect to Mississippi and referred to in its brief (pp. 55-57)[*] was subsequently rendered infirm by the remand as well as by the Commission's own findings and order terminating the rate proceeding dated July 20, 1948.[**] It should be noted too

[*] The Commission findings on this were:

"During the interval from January 26, 1946, to the present date Corporation has made extensive additions to its pipeline system to meet the increasing demands of ultimate consumers served by the gas distribution companies served by

that the Commission felt that this disposition of the case was fair to Mississippi's "ultimate consumers".[9]

Mississippi points out in its STATEMENT herein that the Commission determinations in its rate case based on 1943 volume of sales were not intended to give a true picture

Corporation. These increments to pipeline capacity have resulted in greatly changed factors in the costs and operations of Corporation's pipe line system.

"In view of these circumstances and the prospect of further increasing costs and changes in methods of operations it appears necessary in the public interest that adjustments equitable to both ultimate consumers and Corporation should be made in the rates and charges heretofore ordered by the Commission; commensurate with the service Corporation has been and now is being called upon to render to its gas distribution company customers for resale to ultimate consumers. Corporation's conditions of service now vary greatly from the conditions of service considered by the Commission when it issued its order of November 9, 1945.

"Wherefore, for the purpose of settling and terminating the proceedings in this matter in so far as it pertains to Corporation, it is hereby stipulated and agreed by and between Counsel for the Commission and Counsel for the Corporation as follows:

"Corporation will file with the Commission, and the Commission will accept for filing, supplements to the presently effective rate schedules of Corporation which shall provide for the following rates and charges:

(1) A supplementary rate schedule effective for all bills based on meter readings made after January 20, 1946; through and including the month of September 1947 having a net monthly rate for firm gas composed of a demand component of $1.00 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries; and

(2) A supplementary rate schedule effective as to all bills rendered in October 1947 and continuing thereafter, having a net monthly rate for firm gas composed of a demand component of $1.12 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries."

[9] *Supra*, footnote 8.

of Mississippi's 1943 rate situation because of eliminations and adjustments made by the Commission Staff and accepted by the Commission in its rate order (4 F. P. C. 340). Beginning on page 55 of its brief the Commission apparently is trying to indicate that the determination based on 1943 volumes should now be considered effective against Mississippi in order to deprive it of that amount of money which it would have been entitled to keep had no stay order ever been entered in the Interstate review proceedings. In addition to the frailty of this conclusion because of the adjustments and eliminations made, it must be noted that any 1943 determination, even if fairly made as to conditions then obtaining, would be a finding as to the lawfulness of past rates. It is conceded that the Commission's power to fix rates is limited to those "to be thereafter observed and in force" (Natural Gas Act, Sec. 5(a), 15 U. S. C. Sec. 717d). There is some question as to whether the Commission has power to make findings as to the lawfulness of past rates (see *Hope* case, *supra*, 320 U. S. at 618), but even if it has such power any errors obtaining in the 1943 findings which were not the basis for making a future rate determination could not be assigned as error and, consequently, were not reviewed by the Court of Appeals. Review in such case would have to abide the event of future administrative action. *Hope* case, *supra*, 320 U. S. at 619. If the Commission is contending, therefore, that the conclusions contained in its original rate order against Mississippi (4 F. P. C. 340) are effective in any sense and the court below should follow such rationale, the way then would be open for Mississippi to seek further review of said 1943 determinations, or else it would be deprived of such review if "administrative action" is the prerequisite. In the one case, the court below would be called upon

either to engage in nonjudicial administrative rate determinations or else, if the appeal be to the Commission findings and not the court's use thereof, its order could be collaterally attacked. On the other hand, if neither of the foregoing applies, the right of Mississippi to have such determinations reviewed would be lost.

The argument under this part of the Commission's brief is still directed toward showing that the *Central States* case should be distinguished and should not in itself have compelled the result reached by the court below. With this main purpose as well as the thesis of the Commission argument that ultimate consumers should not be affected by the grant of a stay in mind, the argument of the Commission still, overall, is consistent with the award to Mississippi.

C. The Commission contends: "*No other method of resisting the claim of the immediate purchasers is available.*"

This subsection of the Commission's argument contains obvious fallacies which it will not be necessary for Mississippi to point out for this respondent's position is consistent with the major assumption of the above quoted subsection "C" of the Commission's argument. Mississippi has itself, with the Commission itself, placed its rate status in such a position that its ultimate consumers, through action of appropriate state agencies, can secure all benefits which would have accrued to them had no stay order ever been entered in the *Interstate* case.

D. The Commission contends: "*The terms of the stay orders involved are different.*"

The stay order below provides (R. 2) for return to ultimate consumers or others "as contemplated by the pro-

visions of the Natural Gas Act." Mississippi has demonstrated the benefits accruing to ultimate consumers under the Commission order settling its rate controversy from the time even the remanded order was effective against it. It also has shown that since the Natural Gas Act provides only for prospective rate changes "after a hearing" (Section 5(a), 15 U. S. C. Sec. 717d(a)), giving effect to the Interstate reduction from the time of the effective date of the Commission order against Mississippi is "as contemplated by the provisions of the Natural Gas Act".

It is respectfully submitted that analysis of the whole of the Commission's argument will disclose no inconsistency of consequence with Mississippi's position.

Aside from the fact that there is no inconsistency with the argument as presented by the Commission and Mississippi's claims, it must be pointed out that the terms of the stay order cannot be considered conclusive as to the rights of Mississippi who was not a party to the proceedings in the court below prior to the time it was permitted to intervene in this case when Interstate sought the distribution of funds (R. 67, 71). It also is important to bear in mind that the provisions of the order did not bind the court below to return the funds to any particular group or class. In exercising its equity powers the court below "entered into no contract or understanding as to the manner of disposing of the funds; its duty with respect to it is that prescribed by the applicable principles of law and equity * * *." *United States v. Morgan*, 307 U. S. 183 at 194.

Conclusion.

The judgment of the court below should be affirmed as to Mississippi because to do otherwise would allow accomplishment by indirection the award of reparations against a natural-gas company contrary to the intent of Congress.

Respectfully submitted,

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